IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| LAWRENCE E. FELDMAN, d/b/a/ LAWRENCE E. FELDMAN and ASSOCIATES, | : | |
| Plaintiff, | : | |
| v. | : | CIVIL ACTION NO. 06-cv-2540 |
| GOOGLE, INC., | : | |
| Defendant. | : | |

**MEMORANDUM OF LAW IN SUPPORT**
**OF THE MOTION OF DEFENDANT GOOGLE, INC.,**
**TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(6)**

Defendant Google, Inc. ("Defendant" or "Google"), submits the following Memorandum of Law in support of its Motion to Dismiss the Amended Complaint Pursuant to Fed.R.Civ.P. 12(b)(6).

## I. INTRODUCTION

Plaintiff Lawrence Feldman, d/b/a Lawrence Feldman & Associates ("Plaintiff" or "Feldman"), alleges that he contracted with Google to purchase advertisements on the Internet, and that Google breached the contract and violated other laws by overcharging him for those ads. The contract in question, which is attached to the original Complaint, contains a forum-selection clause which requires that any dispute "must be . . . adjudicated in Santa Clara County, California." *See* the original Complaint and Contract attached hereto as Exhibit A, Contract at ¶7.

As this Court has observed, forum-selection clauses must be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that the party seeking the non-contractual forum will for all practical purposes be deprived of his day in court." *Anastasi Bros.*

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*Corp. v. St. Paul Fire and Marine Ins. Co.*, 519 F. Supp. 862, 863 (E.D.Pa. 1981) (Giles, J.), *quoting M/S Bremen v. Zapata OffShore Co.*, 407 U.S. 1, 18 (1972). Feldman -- an attorney who litigates on behalf of clients in California -- can readily proceed in Santa Clara County, California, as the contract requires him to do. Because Feldman sued in the wrong forum, the Court should dismiss this action.

## II. PROCEDURAL HISTORY

On or about March 9, 2006, Feldman commenced this lawsuit by filing a writ of summons in the Philadelphia Court of Common Pleas, naming Google as a defendant. On or about June 5, 2006, Feldman filed his original Complaint in the Court of Common Pleas. In his Complaint, Feldman alleged damages in excess of $100,000. Given the diversity of citizenship, Google filed a timely Notice of Removal pursuant 28 U.S.C. §1332. To enforce the parties' contractually chosen forum selection clause, Google then filed a Motion to Dismiss. In an apparent attempt to circumvent this Court's jurisdiction, Feldman then filed an Amended Complaint, reducing his demand for damages to "approximately $50,000."[1]

[1] While Feldman apparently hopes to divest the Court of jurisdiction by revising his damage allegation, he has not moved to remand. If he does, that motion would be meritless. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217 (3d Cir. 1999) (holding that "the amount in controversy is measured as of the date of removal, a practice similar to that in original jurisdiction suits where the inquiry is directed to the time when the complaint is filed"), *overruled on other grounds by Exxon Mobil Corp. v. Allapattah Services*, 545 U.S. 546 (2005). *See also Kobaissi v. American Country Ins. Co.*, 80 F.Supp.2d 488, 489 (E.D.Pa. 2000) (noting that "the amount in controversy is determined as of the date of removal, that is, a plaintiff may not subsequently amend a complaint so as to defeat federal jurisdiction."); *Rogers v. Wal-Mart Stores, Inc.*, 230 F.3d 868, 871-72 (6th Cir. 2000) (holding that a post-removal stipulation reducing the amount in controversy to below the required jurisdictional amount is ineffective to deprive a district court of jurisdiction); *Allen v. R&H Oil*, 63 F.3rd 1326, 1336 (5th Cir. 1995) ("Once the district court found that it had jurisdiction, the jurisdiction is deemed to have vested in the court at the time of removal. An amendment to the complaint limiting damages for jurisdictional purposes cannot divest jurisdiction.").

Because Feldman's Amended Complaint is subject to dismissal just as his original Complaint was, Google now renews its Motion to Dismiss.

## III. RELEVANT ALLEGATIONS IN THE AMENDED COMPLAINT[2]

Feldman is a personal-injury attorney who entered into a contract to use Google's AdWords program in January 2003. *See* Amended Complaint, ¶ 5. AdWords is a form of Internet advertising. It allows advertisers to bid against each other to have their ads displayed when Internet users type selected keywords in their searches. The advertiser then pays Google each time a user clicks on its ad. *See* Amended Complaint, ¶¶ 6-9. Feldman used the AdWords program to display ads for his law firm associated with the keywords "Vioxx," "Celebrex," and "Bextra," in an effort to attract personal-injury plaintiffs to sue the manufacturers of those drugs. *See* Amended Complaint, ¶¶ 7 and 18.

Feldman's contract with Google requires disputes to be adjudicated in California. Paragraph 7 of the agreement provides:

> **7. Miscellaneous**. The Agreement must be . . . governed by California law, except for its conflict of law principles ***and adjudicated in Santa Clara County, California.***

*See* Exhibit A, Contract at ¶ 7 (emphasis added). Despite this requirement, Feldman sued Google in the Court of Common Pleas of Philadelphia County, Pennsylvania, alleging that Google overcharged him by more than $100,000. Google removed the case to this Court pursuant to the Court's diversity jurisdiction and filed a Motion to Dismiss. Feldman filed an Amended Complaint, and now Google renews its Motion to Dismiss to enforce the contract's forum-selection clause.

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[2] As Rule 12(b)(6) requires, for the purpose of this Motion, Google assumes that the facts alleged in the amended Complaint are true. *Hedges v. United States*, 404 F.3d 744, 750 (3rd Cir. 2005).

## IV. ARGUMENT

### A. This case should be dismissed because Feldman sued in the wrong forum.

The Third Circuit has repeatedly held that a motion to dismiss under Fed.R.Civ.P. 12(b)(6) is an appropriate procedural mechanism for enforcing a forum-selection clause. *Salovaara v. Jackson Nat. Life Ins. Co.*, 246 F.3d 289, 297-99 (3d Cir. 2001) (holding that "a 12(b)(6) dismissal is a permissible means of enforcing a forum selection clause"); *Wall Street Aubrey Golf, LLC v. Aubrey*, 2006 WL 1525515 at 1 n.1 (3d Cir. June 5, 2006) (same). Dismissal is appropriate here because Feldman cannot meet his burden of showing that the forum-selection clause in the Google contract is unenforceable.[3]

"Because forum selection clauses are presumptively valid, the party objecting to enforcement of the clause bears the 'heavy burden ... of proving that enforcement would be unreasonable and unjust'" under the circumstances. *In re Diaz Contracting, Inc.*, 817 F.2d 1047, 1052 (3d Cir.1987), *quoting M/S Bremen v. Zapata OffShore Co.*, 407 U.S. 1, 15 (1972). *See also Anastasi Bros. Corp.*, *supra*, 519 F. Supp. at 863 (Giles, J.) (observing that forum-selection clauses should be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that the party seeking the non-contractual forum will for all practical purposes be deprived of his day in court.").

To overcome a forum-selection clause, the party objecting to the contractual forum must establish, (1) that the clause is the result of fraud or overreaching, (2) that enforcement would violate a strong public policy of the forum, or (3) that enforcement, in the particular circumstances of the case, would be so unreasonable that it would deprive a litigant of his day in

[3] As an alternative remedy, pursuant to 28 U.S.C. §1404(a), this Court in its discretion may transfer the case to the U.S. District Court for the Northern District of California, whose San Jose Division is located within Santa Clara County.

court. *Coastal Steel v. Tilghman Wheelabrator, Ltd.*, 709 F.2d 190, 202 (3d Cir. 1983). *See also Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1219 (3d Cir. 1991) (same). Feldman cannot meet any of these burdens.

**1. The parties' forum selection-clause was not the product of fraud or overreaching.**

"[T]he mere allegation of fraudulent conduct does not suspend operation of a forum selection clause. Rather, the proper inquiry is whether the forum selection clause is the result of 'fraud in the inducement of the [forum-selection] clause itself.'" *MoneyGram Payment Systems, Inc. v. Consorcio Oriental, S.A.*, 2003 WL 21186124 (3d Cir. May 21, 2003), *citing Prima Paint Corp. v. Flood & Conklin Mgf. Co.*, 388 U.S. 395, 403-04 (1967). Feldman can provide no evidence that he was fraudulently induced into agreeing to a forum selection clause as part of his AdWords contract.[4]

Nor can he prove that the clause was the product of overreaching. The typical case for invalidating a forum-selection clause as a result of overreaching occurs when unsophisticated consumers, who possess no bargaining power, enter into contracts of adhesion with powerful corporations. *General Engineering Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 360 (3d Cir. 1986). Frequently, the clause is written in fine print and in complicated language inaccessible to an unsophisticated customer. *See BABN Technologies Corp. v. Bruno*, 25 F. Supp.2d 593, 595-96 (E.D.Pa.1998) (holding that a forum selection clause is not a product of fraud or overreaching where it is "written in plain English and is located in uniform type directly above [the party's] signature line in the agreement.").

[4] In his amended Complaint, Feldman included a new cause of action for so-called "Fraudulent Inducement." *See* Amended Complaint at Count III. Notably, however, nowhere does Feldman allege particularized facts showing fraud in the inducement of the forum-selection clause itself, as the law requires. *Id.* *See also* Fed.R.Civ.P. 9(b). Accordingly, these new allegations have no bearing on the enforceability of the forum-selection clause.

Feldman is far from an unsophisticated consumer. He is an attorney who touts his ability to defeat large pharmaceutical companies in complex products-liability litigation; he is fully capable of understanding the consequences of signing an agreement that requires disputes to be adjudicated in California. In such circumstances, courts routinely uphold the validity of forum-selection clauses. *General Engineering Corp.*, *supra*, 783 F.2d at 360 (holding that such a contract provision is valid where "[b]oth parties … are sophisticated business entities capable of understanding and adjusting for the risks associated with a forum selection clause.").

Finally, the forum selection clause was drafted in plain, unmistakable English and in normal type, further evidencing the fact that this contractual provision was not the product of coercion or overreaching. *See BABN Technologies, supra,* 25 F. Supp.2d at 595-96.

**2. Enforcement of the forum-selection clause will not violate public policy.**

Courts in the Third Circuit have routinely held that enforcement of forum-selection clauses in circumstances like these does not violate public policy. If anything, enforcement of the clause will advance public policy by giving force and effect to the parties' agreement. *See Source Buying Group, Inc. v. Block Vision, Inc.*, 2000 WL 62972 (E.D.Pa. Jan. 14, 2000) (Giles, J.), *citing Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir.1995) (while deference "should be afforded to the plaintiff's initial selection of forum (evinced by where the action is originally filed), 'a forum selection clause is treated as a manifestation of the parties' preference as to a convenient forum."). For this reason, courts in this Circuit, and elsewhere, routinely enforce the type of forum selection clause at issue here. *See, e.g.*, *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 915 (3d Cir.1988) (holding that the practice of ignoring forum selection clauses "would be to revisit the 'parochialism' and 'provincialism' that the Supreme

Court decried in [the] *Bremen* [case]”).[5]

Furthermore, given that the court that presides over this case must apply California law, it is entirely appropriate to defer the adjudication to a California forum. *Falcone v. Mediterranean Shipping Co.*, 2002 WL 32348270 (E.D.Pa. Apr. 3, 2002) (dismissing case based on a forum-selection clause where foreign forum would be better at interpreting its own laws); *Hoffer v. InfoSpace.com, Inc.*, 102 F. Supp.2d 556, 577 (D.N.J. 2000) (transferring case from New Jersey to Washington State, in part, because the Washington courts are in a better position to interpret Washington law which would govern the case); *Suhre Associates, Inc. v. Interroll Corp.*, 2006 WL 231675 at 2 (D.N.J. Jan. 31, 2006) (holding it more appropriate to litigate the action in North Carolina, where the courts will be more familiar with the relevant North Carolina state law).

**3. Enforcement of the forum-selection clause will not deprive Feldman of his day in court.**

Adjudicating this case in California will not be so inconvenient as to deprive Feldman of his ability to litigate the case. While Feldman may claim an increased burden in litigating the matter in California, “[m]ere inconvenience or additional expense is not the test of unreasonableness, since it may be assumed that the [Plaintiff] received under the contract consideration for these things.” *Anastasi Bros. Corp., supra*, 519 F. Supp. at 864 (Giles, J.), *citing Central Contracting Co. v. Maryland Cas. Co.,* 367 F.2d 341, 344 (3d Cir.1966).

[5] *See also Salovaara v. Jackson Nat. Life Ins. Co.*, 246 F.3d 289, 297-98 (3d Cir. 2001) (holding the dismissal of case appropriate in the context of a forum selection clause mandating the resolution of disputes in the State of New York); *Crescent Intern., Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944-45 (3d Cir. 1988) (upholding dismissal of case in the face of a forum selection clause that mandated resolution of disputes in Miami, Florida); *Wall Street Aubrey Golf, LLC v. Aubrey*, 2006 WL 1525515 at 1, n.1 (3d Cir. June 5, 2006) (upholding dismissal of case where forum selection clause directs litigation in Pennsylvania state court); *Dentsply Intern., Inc. v. Benton*, 965 F. Supp. 574 (M.D.Pa. 1997).

Thus, courts have repeatedly held that the financial hardships of litigating the case in another forum will not justify voiding an otherwise valid forum selection clause. *See Commerce Commercial Leasing, LLC v. Jay's Fabric Center*, 2004 WL 2457737 (E.D.Pa. Nov. 2, 2004), *citing Central Contracting Co. v. Maryland Cas. Co.*, 367 F.2d 341, 344 (3d Cir. 1966). *See also Ferketich v. Carnival Cruise Lines*, 2002 WL 31371977 at 6 (E.D.Pa. Oct. 17, 2002) (holding that although plaintiff "is 75 years old and experiences difficulty in traveling, this inconvenience is not severe enough to demonstrate that litigating in Florida will 'be so manifestly and gravely inconvenient' for her that she will be deprived her day in court."); *Falcone v. Mediterranean Shipping Co.*, 2002 WL 32348270 (E.D.Pa. Apr. 3, 2002) (holding that Italy is not so inconvenient a forum as to justify invalidation of a forum selection clause); *Drucker's, Inc. v. Pioneer Electronics (USA), Inc.*, 1993 WL 431162 (D.N.J. Oct. 20, 1993) (holding that dismissal with leave to commence action in California is not so onerous as to justify invalidating forum selection clause).

Indeed, such a claim by Feldman would ring particularly hollow considering that he chooses to litigate other matters in the California courts. For example, Feldman's web site, www.leflaw.com, states that he is counsel of record in a class action titled *Hapner v. Sony Electronics, Inc.*, Case No. GIC839244, filed in 2005, and pending in San Diego, California.

Finally, there can be no dispute that California is a reasonable forum for litigating Plaintiff's claims. First, the alleged wrongful acts -- overcharging for Internet advertising -- occurred in California. Second, because Google is headquartered in California, the relevant documents and witnesses will almost certainly be located there as well. Third, not only do the California courts have a great deal of expertise in commercial litigation involving similar web-based technology, but Feldman has included a count in his Amended Complaint alleging that

Google violated the California Business and Professions Code, §17200. *See* Amended Complaint at Count VI, ¶¶ 47-53. Thus, it is clear that a California court is not only a reasonable forum, but also the correct forum for adjudicating this dispute.

Feldman freely and voluntarily chose to advertise with Google. He could have expended his advertising dollars somewhere else. Likewise, he could have attempted to negotiate a different forum for adjudicating disputes. But he did not. In entering into the contract, Plaintiff accepted its benefits as well as its obligations. Because the contract prohibits Feldman from suing in Pennsylvania, the Court should dismiss this action without prejudice, allowing him to proceed in Santa Clara County, California.

**B. In the alternative, if the Court does not dismiss or transfer this matter, it should dismiss Feldman's unjust enrichment claim with prejudice.**

Feldman has asserted claims for both breach of contract (Count I) and unjust enrichment (Count V). But California law, which controls this action, bars claims for unjust enrichment when the parties' relationship is governed by an express contract. *California Medical Ass'n, Inc. v. Aetna U.S. Healthcare of California, Inc.*, 94 Cal. App. 4th 151, 172 (2001). Pennsylvania law does the same. *See Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987) (holding that "the quasi-contractual doctrine of unjust enrichment [is] inapplicable when the relationship between the parties is founded on a written agreement or express contract."); *Benefit Trust Life Ins. Co. v. Union Nat. Bank of Pittsburgh*, 776 F.2d 1174, 1177 (3d Cir. 1985) (same).

Here, the parties entered into a written contract, and Feldman has sued Google for breaching that contract. *See* Exhibit A. Accordingly, he cannot sue under a theory of unjust enrichment.

## V. CONCLUSION

For the foregoing reasons, Defendant Google, Inc., respectfully requests that this Court grant its Motion to Dismiss the Amended Complaint. Since this dismissal will be without prejudice, Plaintiff will be able to refile this matter in the proper forum, Santa Clara County, California. In the alternative, if this matter is not dismissed, Google requests that this Court dismiss with prejudice Plaintiff's claim for unjust enrichment as set forth in Count V of the Amended Complaint.

LINDY & ASSOCIATES, P.C.

By: **_\s_David J. Berney________**
Jeffrey M. Lindy, Esquire
David J. Berney, Esquire,
Of Counsel
1800 JFK Boulevard
Suite 1500
Philadelphia, PA 19103
215.575.9290

Attorneys for Defendant,
Google, Inc.